In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 153

PAUL BANKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment of the court of appeals was affirmed without opinion (R. 33a).

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1965 (R. 33a). The petition for a writ of certiorari was filed on May 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government has an absolute obligation to produce as a witness an informer whose identity has been disclosed but who cannot be found after a diligent search.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of New York on two counts of an indictment charging narcotics sales in violation of 21 U.S.C. 173 and 174 (R. 1a-2a). On appeal the conviction was affirmed (R. 33a).

The principal government witness was narcotic agent Casale who testified that petitioner sold him narcotics on November 14 and November 21, 1963. An informant, Lloyd Crider, was present (R. 5a-6a). At the beginning of Casale's testimony, petitioner's counsel requested production of the informer, stating that if Casale obtained any narcotics he got them from the informer, not from the petitioner (R. 4a). The government attorney represented to the court that the government did not know where the informer could be located; that agents Fluhr and Manning had attempted to locate the informer on eight occasions, the most recent being the previous night; that Fluhr had heard from the informer in March 1964; that Fluhr did not have the informer's home telephone number and that, as the attorney understood it, the informer used to call Fluhr (R. 4a-5a). Casale testified that he had been told that the agents intimately connected with the informer had made various attempts to locate him (R. 5a).

Agent Fluhr testified that during the preceding week he had been looking for the informer on Broadway between 42nd Street and 145th Street in various places he had known him to frequent (R. 7a). The agent had no idea where the informer could be located. Fluhr testified that he had not checked with the F.B.I. for fingerprints or with New York City police officers (R. 8a).

The following colloquy occurred (R. 8a-9a):

> Mr. Fusco (petitioner's attorney): The fact remains, Judge, if the informant had been produced here I would not be putting the defendant on the stand, and his failure in being produced has constrained me now to put the defendant on the stand.
>
> The Court: Does the Government know where the informant is?
>
> Mr. Samuels (government attorney): No, Your Honor.
>
> The Court: And we have had testimony to the effect that efforts have been made to find him.
>
> I have no reason to doubt the accuracy of Mr. Samuels' representation that the Government does not know where he is and is not in a position to produce him.
>
> Under those circumstances, there is nothing I can do about the informant. As I said before, you must decide whether to put him on the stand or not.

Petitioner then took the stand to deny that he had made the narcotics sales charged.

ARGUMENT

Although required to give such information of the informer's whereabouts as it has, and to extend reasonable cooperation in securing his appearance, the government has no absolute obligation to produce the informer as a witness, as petitioner contends. *United States* v. *Cimino*, 321 F. 2d 509, 512 (C.A. 2), certiorari denied, 375 U.S. 974; *United States* v. *D'Angiolillo*, 340 F. 2d 453, 455-456 (C.A. 2), certiorari denied, 380 U.S. 955; *United States* v. *Miguel*, 340 F. 2d 812, 815 (C.A. 2); *United States* v. *Simmons*, 338 F. 2d 804, 806 (C.A. 2); *Williams* v. *United States*, 273 F. 2d 781, 795-796 (C.A. 9), certiorari denied, 362 U.S. 951; *Eberhart* v. *United States*, 262 F. 2d 421, 422 (C.A. 9). *Roviaro* v. *United States*, 353 U.S. 53, requires only that the government identify its informer, which was done here.

The government agents checked at places frequented by the informer on at least eight occasions, but were unable to find him. The fact that the F.B.I. and New York City police records were not searched is not of controlling importance; there was no showing that these would have disclosed an accurate address for reaching the informer. Petitioner made no motion for a continuance to permit inspection of such records, nor did he suggest any procedure under which a further search could be made. The record shows that after a diligent search by both the government and the petitioner himself, the informer could not be found. Under these circumstances the

trial court properly ruled that the government was under no absolute obligation to produce the informer.

Petitioner was not coerced into taking the stand by reason of non-production of the informer. His counsel made this decision as a matter of trial strategy, as would be necessary in any other case where he considered it advantageous that an accused should testify.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JUNE 1965.

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